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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 507.

LEE WALKER, *Appellant*,

vs.

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a Municipal Corporation, HAL EVERETT, City Manager of Said City, JOHN OLSON, Mayor and Member of the City Commission of Said City et al., *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

Appellees controvert that portion of appellant's statement of the case wherein appellant states that the appellees' Answer shows that the Notice of Condemnation had

been addressed to approximately thirty-three persons and that appellant's name was twenty-fifth on the list, since neither appellees' Answer nor appellant's Petition contains a copy of said notice. Appellees are perfectly willing to have the Court consider the said notice as a part of the case, but simply wish to clarify the point that appellant had notice of the contents of appellees' Answer at all times. The only answer ever filed by appellees is shown in the Transcript of Record, at pages 24 and 25, and a copy of the same was mailed to appellant's attorney on October 14, 1954, the same date said Answer was filed in the office of the Clerk of the District Court of Reno County, Kansas. Appellant then filed his Reply on October 19, 1954. Thus, appellant's contention that he was never served with a copy of said Answer is incorrect.

SUMMARY OF ARGUMENT.

Appellant challenges the constitutionality of a statute of Kansas, and since there is a presumption that the statute is constitutionally valid, it must clearly appear to be unconstitutional before it can be declared invalid.

Condemnation proceedings are essentially *in rem* and not *in personam*, and personal notice to the owner, whether he be a resident or non-resident, is not a constitutional prerequisite to the validity of such proceedings. Therefore, a notice by publication is sufficient to satisfy the requirements of due process of law.

Numerous cases have been decided construing statutes similar to the one involved here, and all have held notice by publication in condemnation proceedings to be reasonable and not violative of the due process clause. The very statute involved herein has been construed and held constitutional by the United States Circuit Court in another case and *certiorari* denied in said case by this Court.

ARGUMENT.

POINT I.

A Statute Must Clearly Appear to Be Unconstitutional Before It Can Be Declared Invalid.

Appellant is challenging the constitutionality of the General Statutes of Kansas, 1949, 26-202. This being the case, the invalidity of the statute must clearly appear. A statute should not be held unconstitutional unless it is clear that it does not conform with constitutional provisions, and its invalidity must be manifest. All doubts as to its constitutionality should be resolved in its favor, and this Court must be convinced beyond a reasonable doubt of the unconstitutionality of the statute. The burden of proving such unconstitutionality is upon the appellant in this case. *City of Salina* v. *Missouri Pacific*, 169 Kan. 579, 220 P. 2d 147; *State* v. *Morton*, 158 Kan. 503, 148 P. 2d 760; *Miller* v. *Jackson*, 166 Kan. 141, 199 P. 2d 513; *Board of Education of School District No. 1* v. *Robb*, 168 Kan. 368, 212 P. 2d 306.

POINT II.

Proceedings in Eminent Domain Are in Rem and Not in Personam. Constructive Notice by Publication to a Resident Landowner in Such Proceedings Is Sufficient, and One Notice Published in a Newspaper Ten Days Before Meeting of Commissioners for Assessment of Damages Is Adequate and Meets the Requirements of Due Process.

We turn now to the question of whether or not G. S. 1949, 26-202, violates the due process clauses of the Federal and State Constitutions. In other words, is the notice

precribed by the aforesaid statute sufficient notice in a condemnation proceeding? It is the contention of the appellees that the notice by publication in the official city paper, prescribed by said statute, is sufficient to comply with the constitutional requirements. The pertinent provisions of the said statute read as follows:

> G. S. Kansas, 1949, 26-202. "The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

It is a well-established rule of law that such statutes are constitutional and meet the requirements of due process without personal service of notice, and that proceedings to exercise the right of eminent domain are *in rem* and not *in personam* (29 C. J. S. 1129; 18 Am. Jur. 738; *Todd* v. *Atchinson, Topeka & Santa Fe Railroad Company,* 134 Kan. 459, 7 P. 2d 79).

In Volume 1 of Nichols on Eminent Domain, language in support of such a statute is found at page 339, where it is said:

> "When constructive notice only is required, a posting of the notice upon the land affected, or publication of it in a local newspaper is sufficient."

Again at page 344 is found the following:

> "If a statute provides for sufficient notice to satisfy the Constitution and the proceedings are in accordance with the statute, but the owner does not

> in fact learn of the taking, he is nevertheless charged with notice, and his legal rights are the same as if he had been personally notified."

The same principle is defined in Volume II of McQuillin, Municipal Corporations, at page 531, where it was said:

> "It is obvious that condemnation proceedings are essentially *in rem*, and, therefore, a notice by publication is sufficient to satisfy the requirements of due process of law."

Again at page 549 it is said:

> "It is almost universally held, however, that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending."

Finally, the same principle is laid down in 20 C. J. 938:

> "Personal notice to the owner is not a constitutional prerequisite to the validity of condemnation proceedings, and it is competent for the legislature to provide for constructive notice by publication."

(See also Merrill on Notice, Vol. 1, p. 510; Lewis on Eminent Domain, Third Edition, p. 1010, Sec. 568; Randolph on Eminent Domain, p. 306, Sec. 337; 18 Am. Jur., p. 967; and 29 C. J. S., p. 1217.)

In addition, there are numerous decisions from various jurisdictions sustaining the position of the appellees in this case. We will mention only a few of them.

In the case of *Henritzy* v. *Harrison County*, (Miss.) 178 So. 322, the county condemned land without any notice, and published notice in the paper after the condemnation was completed, advising all owners of the land, if they desired compensation for their land, to file claims within thirty days. The Court said:

> "In the case of *Stewart* v. *Hinds County*, 25 Miss. 479, the point was made by the owner of the land that he could not be bound by the condemnation proceedings without being first personally served with notice, he being a resident of the state. But the court held that notice in such case may be either actual or constructive, and particularly so in a case like this (condemnation for highways) which is a proceeding *in rem* and not *in personam.*" * * *. "We believe the present case is strictly a proceeding *in rem*, in which the order of the court is conclusive, whether the party had notice of the proceeding or not."

It can be seen that in the above case the court points out that this is a proceeding *in rem* and not *in personam*, and that as a consequence, constructive notice is sufficient upon either a resident or non-resident. Personal service of notice was not required, and as a matter of fact, unless the owner filed a claim in this case within thirty days, he received nothing whatsoever for his land, and had no notice whatsoever of any meeting of commissioners or intention of the county to appropriate his land.

An eminent domain statute in Missouri required fifteen days' notice for the institution of condemnation proceedings by publication in a newspaper regardless of the residence of the owners. In the case of *Nishnabotna* v. *Drainage District*, (Missouri) 55 S. W. 276, the court upheld the statute, saying:

> "That the legislature had the right to prescribe the manner of giving notice in such cases there can be no question, provided always that it be reasonable."

In the case of *Petet* v. *McClanahan*, (Missouri) 249 S. W. 917, there was a condemnation by the County Court in Missouri. The order of condemnation was published in the newspaper; and, if within twenty days after such

publication no claim for damages was filed in the County Clerk's office, the claims of any owner would be forever barred. The owners were allowed no damages at all if they failed to set up their claim. The court said:

> "Revised Statutes, 1919, Section 10636, permitting the County Court to condemn land for roads and barring claims for damages not filed within twenty days after notice by publication, was not a denial of due process of law by reason of such notice."

In the case of *State of Georgia* v. *City of Chattanooga*, 264 U. S. 472, the court said:

> "Personal service upon the owner is not essential; Publication of notice is sufficient." * * * "Publication of notice is sufficient to give jursdiction in a proceeding under the power of eminent domain to take land for a city street."

In the case of *Newman et al. (Commissioners of District of Columbia)* v. *Lynchburg Investment Corporation*, 236 U. S. 692, it was said:

> "One publication of the notice of condemnation proceedings in each of the three daily papers not less than twenty days before the date fixed for appearance, satisfies the requirements of the court that public notice of not less than twenty days of the institution of such proceedings, be given by advertisement in three daily papers published in the District of Columbia. Twenty distinct publications are not required."

This rule was also approved and followed in the case of *Ballard* v. *Hunter*, 204 U. S. 254.

In the case of *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, the United States Supreme Court said:

> "All persons are charged with knowledge of statutory provisions and must take note of procedure

adopted by them, and consequently, statutes providing for condemnation of land may, without violating due process clause, adopt a summary procedure and provide that notice of such proceeding may be indirect."

"It has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect."

"The limitation of time provided by the Wyoming statute for filing notice of objection and claim for damages to thirty days after the determination of the Board of County Commissioners to establish a public road does not, on its face, appear to be unreasonable, and is not a denial of due process of law. A like or less period of notice by publication has been repeatedly held by this court to satisfy the constitutional requirements."

It will be seen that in the above case, the landowner receives nothing unless he files a claim for damages within thirty days after the determination of the County Commission that his land should be condemned. Such a proceeding was held by the Court not to be a denial of due process of law. As in the Hoffman case, the Kansas statute also provides that the landowner can appeal, if he is not satisfied with the commissioners' award, within thirty days after the same has been filed in the office of the City Clerk; but in any event the landowner is awarded damages for his land. The pertinent Kansas statute relative to appeal is as follows:

G. S. Kansas, 1949, 26-205. "That any person being or claiming to be the owner of any lands so condemned or appropriated or any lienholder of record, and deeming himself aggrieved by the decision or award of said commissioners, may appeal from their award as to the value of the land, crops, build-

> ings and other improvements thereon, and for all other damages sustained by such person by reason of the appropriating of such lands, by filing with the clerk of the said court, within thirty days after the filing of the decision or award of said commissioners, written notice of appeal, and giving bond for the costs thereof, to be approved by said clerk, and thereupon an action shall be docketed and tried the same as other actions, but said appeal and subsequent proceedings shall only affect the amount of compensation to be allowed, and shall not delay the taking possession, occupation, use or improvement of such lands, upon the paying or depositing the amount so assessed by said commissioners with the city treasurer as aforesaid."

In the Hoffman case, the landowner receives no damages whatsoever unless he files a claim within thirty days, and even such a statute as that was held by the United States Supreme Court to be valid.

Further support of such a statute was given in a recent decision of the United States Supreme Court in the case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, where the Court held that the requirements of due process of law were satisfied when a notice given bank depositors was posted on the courthouse door. The Court said:

> "All persons having property located within the state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and other procedure which they set up for those purposes (citing authorities). Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting landowners are familiar examples."

Other cases holding that notice of condemnation proceedings may be indirect are *Ryan* v. *Housing Authority*

of the City of Newark, 15 Atl. 2647; *Great Northern R. Co. v. Minneapolis*, (Minn.) 161 N. W. 231; *Taylor* v. *Emmet Co. Drainage Dist.*, (Iowa) 148 N. W. 1040; *Wulzen* v. *San Francisco*, (Calif.) 35 Pac. 353.

Appellant argues that service of notice by one publication is insufficient, even though he fails to cite any authority for such contention. The essential requirement in this connection is that the notice be reasonably adapted to the nature of the proceedings and afford the property owner a reasonable opportunity to be heard. No case has been found in which a ten-day notice in an *in rem* action has been held lacking in due process. In those instances where the courts have considered publication notices of ten days or less, they have been approved. Three decisions to such effect are:

Pottock v. *Mellott et al.*, 2 Ter. 361, 22 A. 2d 843, a Delaware case, stating that the posting of notice ten days prior to sale of land for taxes was not a denial of due process.

Tilton v. *Decker*, 171 Cal. 731, 154 Pac. 860, holding the Street Opening Act of California provided due process in requiring a ten-day publication notice to the landowners affected after an assessment of their damages had been written and filed.

Winnebago Furniture Manufacturing Company v. *Wisconsin Railway Company*, 81 Wis. 389, 51 N. W. 576, involved a statute virtually identical with the Kansas statute in its provisions as to notice, and the court held:

"The statute provides that notice may be served personally or at the last and usual abode of such owners and parties interested, not less than five days before such hearing (appointing commissioners), or by publication in some newspaper, to be designated by said court or judge, not less than ten days before the

> date set for hearing such petition. The statute undoubtedly gives the right to give notice in either of the methods specified and by publication on resident as well as non-resident owners. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. Mr. Lewis, in his work on Eminent Domain, Section 367, says, 'In regard to the kind of notice which will satisfy the requirements of the Constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or posting is sufficient, even within the jurisdiction where the proceedings are pending.' "

Thus, this Wisconsin statute provided for alternative methods of giving notice either by publication or by personal service, and the Court clearly held in favor of the validity of such a statute, and upheld the ten days' constructive notice on resident owners.

The question of the constitutionality of Section 26-202 has never been presented to the Supreme Court of Kansas, particularly in regard to the matter of notice. Even so, this Court has on many occasions had before it similar questions relating to notice in connection with other condemnation statutes. In the case of *Hunt* v. *Smith*, 9 Kan. 137, the plaintiff alleged that the condemnation proceedings used in appropriating land for a railroad right of way were invalid because of defective notice. At that time, Section 49 of the law required personal notice to be served upon actual occupants of the land, while Section 86 provided for notice by newspaper publication generally. Although the plaintiff alleged he was a resident of the state and in possession of the land, the Court held he was not an actual occupant of the land, and that the service upon him by publication was valid. In its opinion the Court said:

"An owner of land is not in the actual occupancy of the same within the meaning of Section 49 of the act concerning private corporations, unless he is an actual resident thereon; and where such owner is not an actual occupant of the land, notice of the appropriation of a part of the same for a right of way for a railroad given by publication in a newspaper as provided by amended Section 86 of such act, is sufficient."

This same Section 86 was involved in the case of *Missouri River F. S. & G. R. Company* v. *Shepard*, 9 Kan. 647, where a railroad company had condemned certain land owned and occupied by the plaintiff. The plaintiff raised certain technical questions as to the procedure followed by the railroad company, and in the course of its opinion, with reference to notice, the Court said:

"Is the law unconstitutional because providing for no notice? If the law was silent as to notice, and an attempt was made by it to divest one of his property without any pretense of notice, its unconstitutionality would be undisputed. A man cannot be deprived of his property without due process of law. This process of law implies notice; not necessarily actual, personal notice, but notice; such that there is a reasonable probability of the party's receiving it." * * * "Article 9 is not obnoxious to the charge of attempting to divest property without notice. It attempts to provide for notice. It requires notice, gives opportunity to be heard and defend, and right of appeal from the decision of the commissioners to the district court. The real objection, therefore, is that the notice provided for is insufficient. Section 86 of this article reads, that 'before any board of county commissioners shall proceed to lay off any railroad route as herein provided, notice of the time when the same shall be commenced shall be given by publication, thirty days before the time fixed, in some newspaper published in such county,' etc. This does not

> contemplate personal notice. Nor is this essential. As we understand the learned counsel for defendant in error, they concede this. The statutes are full of instances of constructive notice, as in cases of publication against non-residents, in attachment suits, foreclosures of mortgages, etc; or in cases of changes in the valuation of real estate by the boards of equalization; or in the matter of street improvement in cities, or opening roads in the country."

It seems to us that the language employed by the Court in the above case can well be applied in the instant case, and we have found no later decisions of either the Kansas or United States Supreme Court contradicting such language.

This same Section 86 again comes under the scrutiny of the Supreme Court of the United States in the case of *Huling* v. *Kaw Valley Railroad and Improvement Company*, 130 U. S. 559. Even though the landowner in that case was a non-resident of the state, the question involved was the validity of the service as it pertained to such an owner, and the Court, in its opinion, seems to have drawn no distinction between residents and non-residents. With reference to the validity and constitutionality of such publication notice, the Court said:

> "Nor have we any doubt that this form of warning owners of property to appear and defend their interest where it is subject to demands for public use, when authorized by statute, is sufficient to subject the property to the action by the tribunals appointed by proper authority to determine those matters."

Under a statute similar to the one here in question, the Supreme Court of Kansas in the case of *Harrison* v. *Newman et al.*, 71 Kans. 324, 80 Pac. 599, held that notice by publication only is valid and sufficient in condemnation proceedings, the syllabus of the court reading as follows:

> "The notice required by section 160, of the act relating to cities of the first class (Laws 1903, ch. 122) to be given by the appraisers appointed to assess damages and benefits incident to the opening of an alley is a substitute for the notice required by section 161a of the same act to be given by the appraisers appointed to assess damages in condemnation proceedings generally.
>
> A requirement that at least three days' notice in the official city paper shall be given of the meeting of the appraisers in condemnation proceedings is satisfied by the publication of a notice in one issue of such paper nine days before the time set."

The condemnation statute involved in that case merely provided that whenever a city appropriated private property for certain stated purposes, the appraisers shall give at least three days' notice in the official city paper of the time and place of their meeting for the assessment of damages and benefits. The Court held that the condemnation proceeding conducted under said statute was valid, and did not indicate in any way that it felt that such a procedure violated any constitutional requirements.

The statute being questioned herein by appellant has recently been under scrutiny in another case involving the City of Wichita. *Collins et al. v. City of Wichita*, 225 F. 2d 132; No. 392, U. S. S. Ct., Oct. term, 1955, cert. den. 350 U. S. 886. Appellants in that case contended, as does appellant here, that notice by publication in condemnation proceedings did not provide due process, and more particularly that one ten-day notice in a newspaper violates due process. The United States Circuit Court held appellants' contentions to be without merit and unequivocally upheld the constitutionality of the statute involved herein. In the syllabus, the Court stated:

"1. One whose property is sought to be taken from him under the power of eminent domain is entitled to notice and to a hearing with respect to the value of property sought to be so taken and failure to give adequate notice would render such a proceeding void and constitute a lack of due process. U. S. C. A., Const. Amend. 14; 28 U. S. C. A., § 1331.

"2. In condemnation proceedings, property owners whose land is sought to be condemned, need not be served personally with notice of meeting for purpose of fixing damages, and adequate publication of notice is sufficient.

"3. A condemnation proceeding is a proceeding *in rem* and constructive notice meets the requirements of due process. U. S. C. A., Const. Amend. 14, 28 U. S. C. A., § 1331.

* * *

"5. Notice of proceedings for assessment of damages to owners of property sought to be condemned, which was published in newspaper ten days before such proceeding, was adequate and met the requirement of due process. U. S. C. A., Const. Amend. 14; 28 U. S. C. A., § 1331."

Following that decision of the United States Circuit Court in the Collins case, the appellants therein filed Petition for Writ of Certiorari which was properly denied on November 7, 1955, by the United States Supreme Court. Thus, the statute now being challenged has already been determined to be constitutional and valid in every Court, both State and Federal, to which it has been presented for consideration.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

FRED C. LITTOOY,
502 First National Bank Building,
Hutchinson, Kansas,
Attorney for Appellees.